

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**NANETTE S. ANDERSON**

Claimant

VS.

**SHAWNEE HEARTLAND ASSISTED  
LIVING**

Respondent

AND

**DIAMOND INSURANCE CO.**

Insurance Carrier

Docket No. 1,038,417

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the February 29, 2008, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Michael R. Wallace, of Shawnee Mission, Kansas, appeared for claimant. James P. Wolf, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) granted claimant's request for temporary total disability compensation and medical benefits. The ALJ authorized Dr. John Ciccarelli as claimant's treating physician and ordered respondent to pay unauthorized medical in the amount of \$500.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 26, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Respondent asserts that claimant failed to prove she suffered injuries from an accident that arose out of and in the course of her employment with respondent. Respondent contends that the report of Dr. Edward Prostic lacks credibility in that he did

not have accurate facts upon which to base his causation opinion. Respondent also contends that claimant lacks credibility. Respondent requests the Board reverse the Order of the ALJ because the most reliable evidence is that claimant suffered a recurrence of a preexisting back injury as a result of activities she performed outside of her work.

Claimant asserts she proved by a preponderance of the evidence that she suffered injuries from an accident that arose out of and in the course of her employment with respondent. Accordingly, she requests the Board affirm the preliminary hearing Order of the ALJ.

The issue for the Board's review is: Did claimant suffer an accidental injury that arose out of and in the course of her employment?

#### **FINDINGS OF FACT**

Claimant began working for respondent, an assisted living facility, in February 2007 as the activity director. She was involved in the planning of activities, including moving and setting up tables and pushing residents in wheelchairs when loading them on and off buses. She claimed that in doing her job, she was required to push, pull, bend, stoop, lift, and twist. The tables she moved weighed between 75 and 100 pounds, and she testified that she moved 3 to 5 tables 10 or 12 times a week. She also moved a piano at times and sometimes had to take the piano off its rollers.

In March 2007, claimant hurt her back after a family resident activity that required her to move tables and chairs, set up the tables, and move things around. Following this preparation, claimant noticed pain in her low back. She reported the problems to Phyllis Curtis, the facility's director. She took off work for two days and then returned to her normal job duties. Her symptoms eventually went away.

In October 2007, claimant began moving from her apartment and noticed off and on back and left hip pain. During this time, she was performing her regular job duties as well as going through drawers and closets at home in preparation for the move. She also testified, however, that the pain started before she started preparing for the move. She spent 90 days performing this move. During this time she felt her back pain start to increase. She said she had help moving from her boyfriend, her boyfriend's family, and her son-in-law and his friend. During the move, she did not have to do any lifting heavier than a lamp that weighed from 10 to 15 pounds.

Claimant continued doing her regular job duties through December 2007. On Mondays she would feel pretty good, but by Friday she would be sore. The facility had a family Christmas open house on December 16. By that time, her pain was getting worse. On December 19, the pain in her inner groin and down the back side of her left leg was so bad she had to seek medical attention. Claimant went to Leawood Family Care on her

own. From there she was referred to Dr. Kimber Eubanks, who performed three steroid epidurals. Dr. Eubanks then referred her to Dr. Ciccarelli. Dr. Ciccarelli performed surgery on February 8, 2008. Before taking off work for the surgery, claimant told respondent that she thought her problems were related to her employment.

Several years earlier, claimant had a muscle spasm in her upper back that was so bad she could not get out of bed for a couple of days. Eventually the spasm loosened and she was fine again. Claimant had not had problems with her low back before.

Phyllis Curtis, director of respondent's facility, testified that claimant did not request medical treatment for her back. In March 2007, claimant told her that she had ongoing back problems that would flare up from time to time and eventually go away. Claimant spoke with Ms. Curtis in January 2008 and told her that neither she nor her doctor knew what was causing her current back condition. She told Ms. Curtis that the pain could have been caused by her move or the pushing and pulling of the tables at work.

Ms. Curtis did not think claimant moved tables as often as she had testified to and said that claimant would have to move one to three tables from three to five times a week. She said that claimant would seldom have to take the piano off its rollers. Claimant would have to move the piano once a week. She said claimant would only push residents up the wheelchair ramp about once a month. She did not think that claimant's activities at work required an excessive amount of bending, twisting, or anything of that nature.

Katrina Simms, respondent's director of health care services, testified that claimant told her she had back problems before coming to work for respondent. Claimant also told her about a time she previously had some back spasms. Ms. Simms said that claimant told her she did not know what was causing her current back condition but that one possibility was moving tables at work and another possibility was her move. Also, Ms. Simms said that she had worked for respondent five years and had seen the piano off its rollers less than five times.

Claimant was seen by Dr. Edward Prostin on February 22, 2008, at the request of her attorney. Claimant had undergone surgery by Dr. Ciccarelli two weeks before this examination. Claimant complained to Dr. Prostin of pain in the center of her low back near the waistline with frequent numbness going down the left leg. She told him her job involved "repetitiously pushing and pulling on tables as well as on residents."<sup>1</sup> She denied previous problems with her low back or any other preexisting musculoskeletal impairment. Dr. Prostin opined that during the course of claimant's employment at respondent, she sustained repetitious minor trauma to her low back, aggravating her preexisting spondylolisthesis and causing or contributing to her herniation at the level of L4-5. Dr. Prostin's report makes no mention of claimant's move in October to December 2007.

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<sup>1</sup> P.H. Trans. (Feb. 26, 2008), Cl. Ex. 1 at 1.

**PRINCIPLES OF LAW**

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>2</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>3</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>4</sup>

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>5</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or

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<sup>2</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>3</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>4</sup> *Id.* at 278.

<sup>5</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

accelerates the condition.<sup>6</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>7</sup>

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>9</sup>

### ANALYSIS

The ALJ made no findings of fact and no conclusions of law. His Order simply awards benefits. As such, it is impossible to say what weight the ALJ gave to the various witnesses' testimony or to Dr. Prostic's opinions. In particular, it would be helpful to know the ALJ's determination concerning the credibility of the witnesses who testified before him. Nevertheless, because he awarded claimant benefits, it can be assumed that the ALJ found her testimony credible. It is also implicit in his Order that he found claimant proved she sustained personal injury by accident arising out of and in the course of her employment.

Claimant alleges she suffered "[r]epetitive trauma through 12/19/07 and continuing each and every day thereafter" from "[r]epeated work activities."<sup>10</sup> Claimant had experienced some back symptoms before she worked for respondent, but she was asymptomatic when she began her job. She was able to perform her work tasks and remained symptom free for about a month, until March 2007. However, those symptoms resolved after a couple of days of rest. She again was symptom free until October 2007. This time the onset of symptoms coincided with activities she was performing in connection with a move. Over the next few months, her symptoms worsened. When she sought medical treatment, it was with her personal physician. Claimant did not ask respondent for medical treatment. Claimant did not allege her condition was work related until January

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<sup>6</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>7</sup> *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

<sup>8</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>9</sup> K.S.A. 2007 Supp. 44-555c(k).

<sup>10</sup> K-WC E-1, Application for Hearing filed Jan. 22, 2008.

2008. Before that, claimant told her employer that she did not know for sure how she was injured or what caused her back condition.

Dr. Prostic's causation opinion is not particularly helpful because he was apparently unaware of claimant's complete medical history and the facts surrounding the onset of claimant's current symptoms. He not only was unaware of claimant's physical activities in connection with her move but also seemed to have an exaggerated understanding of the physical demands of claimant's job with respondent.

The record is further clouded by claimant's admissions to Ms. Curtis and Ms. Simms that she did not know the cause of her back condition and that it could have been moving the tables at work or it could have been the move. Also, there is the fact that her symptoms began during the time she was performing work at home in connection with that move. And finally, there is the absence of a credible medical opinion on causation. Claimant's injury may have been caused by her work with respondent, or it may have been caused by some other activity, such as the work she did at home. Most likely, it was caused by both. Her work and her personal activities caused or contributed to her injury. Claimant testified that the work she did with respondent was heavier than what she did in connection with her move. In addition, although her symptoms gradually worsened while she was both working for respondent and in the process of moving, the onset of her symptoms preceded her move.

This case presents a close question, but this Board Member is persuaded that claimant has met her burden of proof that her work activities with respondent, in particular moving the tables, piano, and patients, at least contributed to and aggravated her condition.

#### **CONCLUSION**

Based upon the record presented to date, claimant has proven that it is more probable than not that her injury arose out of and in the course of her employment with respondent.

#### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated February 29, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2008.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
James P. Wolf, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge